IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHRISTINE HARRIS	:	NO. 93-144-2

CHRISTINE HARRIS	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 02-6825

MEMORANDUM

Dalzell, J. December 20, 2002

In order to consider Christine Harris's motion to vacate her sentence under 28 U.S.C. § 2255, we must first rehearse the lengthy procedural history of her case in federal court. We also believe that her claims warrant extended attention because, as will be seen, she and her co-defendant have been treated very differently because of the law's rigor.

Background

Acting pursuant to a lawful search warrant, Pennsylvania state troopers forcibly entered 2618 West York Street in Philadelphia in the early hours of May 11, 1992. Two troopers entered the upstairs front bedroom, where they discovered petitioner Christine Harris and Harry Witherspoon lying on the bed in a state one trooper described as "half awake, half asleep." Tr. of Nov. 30, 1993, at 41. The troopers saw a purse on the nightstand that was within Harris's reach, and upon searching it, they discovered, among other items, several identification cards belonging to Harris, a loaded .25 caliber

revolver with a round chambered, and 6.2 grams of methamphetamine bagged for street distribution.

A subsequent search of the bedroom's dropped ceiling revealed a brown paper bag containing 253 grams of methamphetamine wrapped in smaller bags for distribution, $1,998 in cash, and a diamond ring. On the lower floor of the house, troopers discovered mail addressed to Harris and Witherspoon, two triple beam scales, drying crystals and plastic baggies consistent in size and color with those found in Harris's purse and in the dropped ceiling, an additional 28.1 grams of methamphetamine bagged for street distribution, and documents recording drug transactions. The troopers also found a letter from "Chrissie" to "Harry" requesting that he procure "go fast" (a slang term for methamphetamine) for her.

Harris was then charged with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), aiding and abetting in violation of 18 U.S.C. § 2, and use of a firearm in a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).[1] On December 2, 1993, a jury found Harris guilty of all charges, and on March 28, 1994 we sentenced her to 240 months' incarceration. Our Court of Appeals affirmed Harris's conviction and sentence in an unpublished opinion on February 3,

[1] Harris was also charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), but the charge was dismissed before trial on the Government's motion.

1995. United States v. Christine Harris, No. 94-1402, 1995 U.S. App. LEXIS 5158 (3d Cir. Feb. 3, 1995) (McKee, J.).

On August 7, 1996, Witherspoon filed a § 2255 motion which argued that his methamphetamine conviction could not stand in light of United States v. Bogusz, 43 F.3d 82 (3d Cir. 1994). Agreeing with him, on September 18, 1996, we reduced his sentence from 147 months to 120 months. See Order of Sept. 18, 1996.

Almost a year later, on July 11, 1997, Harris filed a § 2255 motion for habeas relief[2] that advanced a Bogusz claim for the reduction of her sentence and additionally argued that, in light of the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995), the evidence adduced at her trial could not support her conviction under the "use" or "carrying" prongs of § 924(c)(1). On April 30, 1998, we denied Harris's petition because she filed it nearly three months after the expiration on April 23, 1997 of the one-year grace period for filing § 2255 petitions by prisoners whose convictions became final before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Order of April 30, 1998, at 3 (citing Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998)). We declined to issue a certificate of appealability, id. at 5, and Harris did not

[2] Harris vigorously argues that her July 11, 1997 filing was not brought under § 2255 but instead was brought under 28 U.S.C. § 3582(c)(B) and then "recharacterized" by this Court, over Harris's protests, as a § 2255 petition in the Order of April 30, 1998. For the reasons provided below, infra Part II.B, we reject this contention.

appeal our dismissal of her petition or our decision not to grant a certificate of appealability.

On July 13, 1998, Harris filed a petition for habeas corpus relief under 28 U.S.C. § 2241 that reasserted her Bogusz and Bailey claims. On August 5, 1998, we dismissed the petition without prejudice on the ground that we lacked jurisdiction over her custodian at the Federal Correctional Institution in Danbury, Connecticut. See Order of August 5, 1998, at 2. Harris then filed a virtually identical § 2241 petition in the District of Connecticut on September 25, 1998. Judge Robert Chatigny of the District of Connecticut appointed Brett Dignam, Esq., of Yale Law School's Jerome N. Frank Legal Services Organization, to represent Harris, and on September 25, 2001, she requested and received a dismissal without prejudice from the District of Connecticut.

On December 10, 2001, Harris returned to this Court and filed a new § 2255 petition advancing, once again, her Bogusz and Bailey claims. In a complex argument set forth in an initial memorandum of law and recapitulated in a reply brief, she contends that we can consider the merits of her claims despite both the one-year AEDPA period of limitation, 28 U.S.C. § 2255, and the requirement (also AEDPA-imposed) that a "second or successive" petition brought under § 2255 must first be certified by the Court of Appeals. For the reasons set forth below, we conclude that the petition before us is a "second or successive"

petition within the meaning of the AEDPA and, absent an order of our Court of Appeals, we cannot consider its merits.

Discussion

Harris acknowledges that we cannot reach the merits of her Bogusz and Bailey claims if her pleadings constitute a "second or successive" § 2255 petition. She states, however, that her petition is not, in fact, a "second or successive" petition within the meaning of the AEDPA. We consider each of Harris's three arguments in support of this proposition.

A. Do the Principles Animating United States v. Miller Justify Vacation of the Order of April 30,1998?

Harris first argues that, in light of our Court of Appeals's decision in United States v. Miller, 197 F.3d 644, 646 (3d Cir. 1999), we should consider our "recharacterization" of her 1997 petition as error, vacate our Order of April 30, 1998, apply the principle of equitable tolling, and deem her present petition to be a first habeas petition timely filed[3] on July 11, 1997. Harris does not ask us to apply Miller retroactively. Pet. at 7. Instead, she contends that vacation of our earlier Order is justified because Miller has recognized the unfairness

[3] As we understand Harris's theory, we would overcome the inconvenient fact that she filed her 1997 petition three months after the expiration of the one-year AEDPA grace period by applying equitable tolling, which would (on this theory) be justified on the grounds that she suffered from depression and post-traumatic stress syndrome in the spring of 1997. Pet. at 12-13.

and, for many prisoners, the procedurally disastrous consequences stemming from district courts' now-abandoned practice of sua sponte recharacterizing prisoners' pleadings as § 2255 petitions.

We see, at minimum, three flaws in this argument. First, it is built on an incorrect factual premise. Harris claims that we "recharacterized" her 1997 pleadings as a § 2255 petition in our Order of April 30, 1998. However, as we explained at length in that Order, Harris's petition was a § 2255 petition from the outset. The record shows that Harris applied for and received leave to proceed in forma pauperis in order to file a § 2255 motion. She filed the motion itself on AO Form 243, which bears the title "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody." Her memorandum of law discusses "[t]he legal standard applicable to § 2255 claim[s]." And while the title to her memorandum of law states that it was brought "in support of motion to correct sentence pursuant to Title 28 U.S.C. § 3582(c)(B)," the body of the memorandum never discusses how § 3582 applies to her case. See Order of April 30, 1998, at 1 n.1. Because we never "recharacterized" Harris's 1997 pleadings as a § 2255 petition, our denial of the petition on timeliness grounds was never tainted with the forms of unfairness Miller identified.

Second, Harris fails to articulate any legal authority for the proposition that we can vacate a final order dismissing a

§ 2255 petition.[4] And finally, even if we had the authority to vacate our final order, there would be no basis for equitably tolling AEDPA's period of limitation until December 10, 2001, when she filed the petition now before us. Equitable tolling is generally proper only when "the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'" Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). While it is true that Harris diligently pursued her claims between 1998 and 2001, such diligence is a necessary but not sufficient prerequisite for equitable tolling. Harris has not identified any reasons why she was prevented, in some "extraordinary way", from returning to this Court before December 10, 2001.

B. Are Harris's Present Pleadings a "First" § 2255 Petition Because We Never Reached the Merits of Her 1997 Petition?

Harris next contends that the Supreme Court's recent decisions on the meaning of the term "second or successive petition" require us to deem her present pleadings to be an

[4] Harris creatively suggests that we can derive such authority from Mason v. Myers, 208 F.3d 414, 419 (3d Cir. 2000), in which our Court of Appeals held that § 2254 petitioners must receive Miller notice and then vacated the district court's dismissal. However, Mason is distinguishable from this case. The district court's order was not final because the petitioner had appealed the dismissal after obtaining a Certificate of Appealability from the Court of Appeals. Id. at 416. Here, by contrast, Harris never appealed our Order of April 30, 1998. And there is no hint in Mason that a district court that (in retrospect) did not provide a petitioner with Miller notice can vacate its own order of dismissal once it becomes final.

initial § 2255 petition because we never reached the merits of her 1997 petition. Pet. at 7-8, citing Slack v. McDaniel, 529 U.S. 473, 486 (2000); Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998); Corrao v. United States, 152 F.3d 188, 191 (2d Cir. 1998) ("Generally, a § 2255 petition is 'second or successive' if a prior § 2255 petition, raising claims regarding the same conviction or sentence, has been decided on the merits."). In essence, Harris argues that if a district court dismisses an initial § 2255 petition on timeliness grounds, a subsequent § 2255 petition is not "second or successive" because the prior dismissal was, in the words of the Supreme Court, a dismissal on "technical procedural reasons" that should not bar the prisoner from receiving habeas relief. Stewart, 523 U.S. at 645 (illustrating the term "technical procedural reasons" with decisions in which district courts dismissed habeas petitions for failure to pay the $5 filing fee or submit in forma pauperis forms).

We decline Harris's invitation to define AEDPA's one-year statute of limitations as a mere "technical procedural" rule akin to a filing fee requirement. Under Harris's theory, a defendant whose initial petition was time-barred could skirt both the statute of limitations and AEDPA's gatekeeping provisions by filing in the district court a second petition -- which would actually be deemed a first petition -- without receiving leave of the Court of Appeals. Such a result is not compelled by the

Supreme Court's decisions in Slack and Stewart,[5] and it would eviscerate AEDPA's statutory scheme.[6] We therefore conclude that, even though the term "second or successive petition" is a "term of art given substance in [the Supreme Court's] prior habeas corpus cases," Slack, 529 U.S. at 486, it is a term whose post-AEDPA meaning by necessity includes habeas petitions by defendants whose initial petitions were dismissed on statute of limitations grounds. Accord McMillan v. Senkowski, No. 01-1259, 2002 WL 221587, at * 3 (S.D.N.Y. Feb. 11, 2002); Hamer v. Cockrell, No. 01-2020, 2002 WL 66310, at * 1 (N.D. Tex. Jan. 11, 2002). See also Guyton v. United States, 23 Fed. Appx. 539, 540 (7th Cir. 2001) (dismissal of a habeas petition "because the district court determined, albeit erroneously, that it was not filed within the applicable statute of limitations . . . operates to dispose of the case on the merits as much as an erroneous finding that a petitioner had failed to state an element of a claim").

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[5] Stewart concerned a prisoner whose initial § 2254 petition contained a claim that was dismissed without prejudice as premature. 523 U.S. at 643. Slack concerned a prisoner whose initial § 2254 petition contained unexhausted claims and had been dismissed under the exhaustion of remedies rule explained in Rose v. Lundy, 455 U.S. 509 (1982). 529 U.S. at 478-79.

[6] As our Court of Appeals has observed, the AEDPA "was enacted, in relevant part, to curb the abuse of the writ of habeas . . . . It provides a one year limitation period that will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances." Miller, 145 F.3d at 618 (3d Cir. 1998) (emphasis in original) (citations omitted). By assigning a gatekeeping function to the Court of Appeals, AEDPA prevents abuse of the writ and "forc[es] federal inmates to litigate all of their collateral claims in one § 2[2]55 hearing . . . ." Miller, 197 F.3d at 651.

C. Are Harris's Present Pleadings a "First" § 2255 Petition Because We Erroneously Dismissed Her 1997 Petition?

Harris next argues that her petition is not "second or successive" because we erroneously dismissed her 1997 petition. This argument relies heavily on Muniz v. United States, 236 F.3d 122 (2d Cir. 2001), and we therefore examine this decision in some detail before considering whether it affords Harris any basis for relief.

In Muniz, the defendant had been convicted and sentenced prior to the AEDPA's enactment. On March 25, 1997, she filed a § 2255 petition asserting a variety of claims. On June 15, 1998, the district court denied her petition as time-barred by AEDPA's one-year limitation period. Nine days after the district court's denial of the petition, however, the Second Circuit announced in Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998) and Mickens v. United States, 148 F.3d 145 (2d Cir. 1998), that all prisoners whose convictions became final prior to AEDPA's effective date would have a one-year grace period in which to file a habeas petition.

Muniz then submitted to the district court an "Application for Certificate of Appealability," which was filed on July 29, 1998. Although the application did not cite Ross and Mickens, it challenged the denial of her petition on timeliness grounds and noted that she had filed it within a year of AEDPA's effective date. The district court apparently disregarded the Court of Appeals's recent decisions and summarily denied her

request for a certificate of appealability on September 9, 1998. Although Muniz had never filed a notice of appeal from the district court's June 15, 1997 order, she on September 24, 1998, appealed the district court's denial of her application for a certificate of appealability. The Court of Appeals sua sponte dismissed the appeal of September 24, 1998 on timeliness grounds. In 1999, the Court of Appeals announced in Marmolejo v. United States, 196 F.3d 377, 378 (2d Cir. 1999), that a pro se application for a certificate of appealability that is filed within the time period required to file a notice of appeal under Fed. R. App. P. 4(a)(1) should be construed as a timely notice of appeal. Muniz, 236 F.3d at 123-25.

In 2000, Muniz filed a motion in the Court of Appeals for an order authorizing her to file a "second or successive" § 2255 petition. The Court of Appeals concluded that her new request for collateral relief was not actually a "second or successive" filing with the meaning of AEDPA and was therefore not subject to AEDPA's stringent restrictions on filing second petitions. Id. at 129. Noting that both the district court and the Court of Appeals had initially denied Muniz relief on a basis of law that was later found erroneous, the Court reasoned that to construe Muniz's 2000 pleadings as a "second or successive" petition would present serious Suspension Clause[7] problems.

[7] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

However, the Court concluded that these constitutional questions could be avoided by deeming her 2000 pleadings to be a "first" § 2255 petition:

> [W]hen a habeas or § 2255 petition is erroneously dismissed on AEDPA limitations period grounds, and another petition is filed that presses the dismissed claims, the subsequently-filed petition is not 'second or successive' if the initial dismissal now appears to be erroneous because the law on which that dismissal was predicated is unarguably no longer good law.

Id.

Harris argues on the basis of Muniz that her current pleadings should be treated as a first § 2255 petition because, in light of subsequent appellate authority, we erroneously dismissed her 1997 petition on timeliness grounds.[8]

Muniz appears to offer a solution to a thorny constitutional problem. But even if we adopted Muniz, Harris has

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[8] The argument that we erred (in retrospect) by dismissing Harris's July 11, 1997 petition is plausible, at least with regard to her Bailey claim. In 1999, our Court of Appeals determined that it had first retroactively applied Bailey on collateral review in United States v. Davis, 112 F.3d 118 (3d Cir. 1997). See United States v. Lloyd, 188 F.3d 184, 186 n.4, 188 (3d Cir. 1999). Davis was decided on April 23, 1997. Harris filed her first § 2255 petition on July 11, 1997, within one year of Davis and well before Bousley v. United States, 523 U.S. 614 (1998), which confirmed that Bailey is retroactively applicable on collateral review. See Lloyd, 188 F.3d at 188 (holding that § 2255 petition asserting Bailey claim and filed in January 1998 was timely).

We note that even if we concluded that Harris's petition is not subject to the AEDPA's limitations on "second or successive" § 2255 petitions, she would still face two significant obstacles. First, she would have to show that she is actually innocent of the § 924(c)(1) charge because she procedurally defaulted her Bailey claim. U.S. v. Garth, 188 F.3d 99, 107 (3d Cir. 1999). Second, she would need to show some justification for equitable tolling of the period between April 30, 1998 and December 10, 2001. We discern no such justification in her most recent pleadings.

not satisfied its procedural prerequisites.

The Seventh Circuit considered the scope of Muniz in Guyton, a case that is procedurally identical to Harris's,[9] and concluded that Muniz's construction of § 2255 cannot avail a petitioner who failed to appeal the dismissal of the original petition. Guyton, 23 Fed. Appx. at 540. The Court's reasoning in Guyton bears extended quotation:

> Had Guyton appealed the district court's dismissal of his first petition, when the question of the propriety of the dismissal was open, we could have corrected the district court's error. Had Guyton appealed the district court's dismissal and this court initially affirmed, but later rejected that decision, we probably still could have corrected both errors (in the district court and on appeal) when he sought to file a second or successive § 2255 petition. See Muniz v. United States. . . . But because Guyton failed to appeal and brought what can now only be considered a second petition, over one and one half years after his first petition was dismissed, we are without the power to correct his error.

Id. (citations omitted).

We find the Seventh Circuit's Guyton analysis persuasive. Because Harris did not appeal our disposition of her 1997 petition, she was never precluded from receiving habeas relief as a result of judicial error. Her case, therefore, does not raise the Suspension Clause problems that Muniz avoids through its construction of the term "second or successive petition." Muniz, 236 F.3d at 129, quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485

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[9] Guyton's first § 2255 petition was erroneously denied as untimely. He never appealed the dismissal. More than eighteen months later, he filed a second § 2255 petition. Guyton, 23 Fed. Appx. 539.

U.S. 568, 575 (1988).

Conclusion

For the foregoing reasons, we conclude that Harris has presented a "second or successive" § 2255 petition that we are powerless to consider without leave of our Court of Appeals. Because Harris has not made a substantial showing of any violation of her constitutional rights, we will not issue a certificate of appealability.[10] See 28 U.S.C. § 2253.

We dismiss Harris's petition with full awareness that the Government has conceded the substantive merit of her Bogusz claim. Govt.'s Resp. at 14-15. We take no pleasure from the fact that the AEDPA's procedural barriers preclude us from granting Harris the same form of relief that we have already afforded her co-defendant, Harry Witherspoon. However, our commitment to the principle that justice requires treating like cases alike must yield to our obligation to uphold the law.[11]

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[10] Although Harris raised a constitutional issue by invoking Muniz, we concluded above that her case does not present the Suspension Clause issues addressed in that decision.

[11] We are most grateful to Brett Dignam, Esq., and student interns Justin Peack and Reshma Saujami of Yale Law School's Jerome N. Frank Legal Services Organization for their superb work on Harris's behalf. We feel it not immodest to suggest that Judge Frank would sympathize with the last sentence of our text, as it was he who wrote, "It is the sworn duty of judges to enforce many statutes they may deem unwise." United States v. Antonelli Fireworks Co., 155 F.2d 631, 665-66 (2d Cir. 1946) (Frank, J., dissenting).

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UNITED STATES OF AMERICA	:	NO. 02-6825

ORDER

AND NOW, this 20th day of December, 2002, upon consideration of the petition of Christine Harris to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255, and the Government's response thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. The § 2255 petition is DENIED;

2. The petitioner having failed to make a substantial showing of the denial of a constitutional right, we decline to issue a certificate of appealability, see 28 U.S.C. § 2253; and

3. The Clerk shall CLOSE this case statistically.

BY THE COURT:

_____
Stewart Dalzell, J.